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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 195

WILLIAM H. KILLOREN, TRUSTEE IN BANKRUPTCY OF HAMILTON-BROWN SHOE COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 20–25) is reported in 119 F. (2d) 364.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 30, 1941 (R. 25–26). A petition for rehearing was denied on May 20, 1941 (R. 31). The petition for writ of certiorari was filed on June 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether it was error for the Referee in Bankruptcy to allow priority to expenses incurred in the administration of the estate by the trustee in bankruptcy over expenses, including taxes, incurred during attempted reorganization before the appointment of the trustee.

STATUTE INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9–16.

STATEMENT

On April 19, 1939, the Hamilton-Brown Shoe Company filed its petition for a corporate reorganization under the provisions of Chapter X of the Bankruptcy Act, and James J. Vardaman and John W. Lake were appointed co-trustees to effect the reorganization. However, on June 22, 1939, the Company was adjudicated a bankrupt, and on July 7, 1939, William H. Killoren was appointed trustee for the purpose of liquidating the estate and took charge of the assets to begin liquidation (R. 3–4, 10).

Between April 19, 1939, and July 7, 1939, Lake and Vardaman, while acting as trustees, had become indebted to the United States on account of taxes which accrued during that period. The amount of these taxes greatly exceeds that of the taxes which accrued while Killoren was acting as trustee (R. 5, 10).

On February 29, 1940, after a hearing on the trustee's petition from an order respecting distribution and priority of payment, the Referee in Bankruptcy entered an order providing that the claims against the bankrupt's estate be classified and that distribution be made by the trustee out of funds in his hands as follows (R. 7–8):

(1) Claims allowed as trust funds in the hands of the trustee, and property held subject to reclamation petitions; (2) fees and expenses incurred in the administration of the estate before the Referee in Bankruptcy after Killoren's appointment as trustee; (3) all claims allowed as preferred, including tax claims during the reorganization period, from April 19, 1939, to July 7, 1939; (4) claims allowed as preferred prior to reorganization proceedings; (5) general claims against the estate.

The Government took exception to the priority granted to the expenses incurred following the appointment of the trustee in bankruptcy. A petition for review of the order, however, was denied by the District Court for the Eastern District of Missouri and the order of the Referee was confirmed (R. 14).

The decision of the District Court was reversed by the Circuit Court of Appeals which held that the expenses described in (2) and (3), *supra,* should be treated equally. Petition for rehearing was denied (R. 25–31).

ARGUMENT

Taxes which accrue during the administration of a bankrupt's estate by a trustee in bankruptcy or during the period of an unsuccessful reorganization of the bankrupt's business are a part of the costs of preserving and administering the estate. *In re Columbia Ribbon Co.,* 117 F. (2d) 999 (C. C. A. 3d); *State of Missouri* v. *Earhart,* 111 F. (2d) 992 (C. C. A. 8th), certiorari denied, 311 U. S. 676; *In re Lambertville Rubber Co.,* 111 F. (2d) 45, 49 (C. C. A. 3d); *In re Humeston,* 83 F. (2d) 187 (C. C. A. 2d); *Hennepin County, Minn.,* v. *M. W. Savage Factories,* 83 F. (2d) 453 (C. C. A. 8th); *Florida Nat. Bank of Jacksonville* v. *United States,* 87 F. (2d) 896 (C. C. A. 5th); *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.,* 39 F. (2d) 574 (C. C. A. 2d). Cf. *Michigan* v. *Michigan Trust Co.* 286 U. S. 334, 344.

Such taxes thus fall within the first class of debts given priority by Section 64 (a) of the Bankruptcy Act of 1898, as amended (Appendix, *infra,* p. 9). The statute provides that when a reorganization proceeding is unsuccessful, it may be followed by a liquidation proceeding under the Bankruptcy Act. The latter is to be conducted "so far as possible, in the same manner and with like effect" as if a bankruptcy proceeding had been instituted at the time the petition for reorganization was filed. By the terms of Sections 238, 241–

246 of the Bankruptcy Act, as amended, when the assets are finally distributed, the judge may allow reimbursement for expenses incurred in the reorganization proceeding (Appendix, *infra,* pp. 13–14, 16). Such debts must then also be paid according to the order of priority set out in Section 64. *Id.,* Section 102 (Appendix, *infra,* p. 10).

Thus the taxes here are to be given the same priority as all other debts under class one of Section 64. That section indicates no order of payment within the class. We submit that where Congress has prescribed no order of priority within a class none should be allowed. *Missouri* v. *Ross,* 299 U. S. 72, 74; *State of Missouri* v. *Earhart, supra; In re Lambertville Rubber Co., supra.* Moreover, the 1938 amendment of this section, in which debts formerly grouped in three classes were placed in class one, constitutes recent evidence of the intention of Congress that debts within anyone class are to be treated equally.

Nor can the clear and complete provisions of the statute be varied or enlarged because of any equitable powers a court of bankruptcy may possess. *Pepper* v. *Litton,* 308 U. S. 295, on which petitioner relies, is not to the contrary. It was held there that the equitable powers of a bankruptcy court permitted it to disallow a particular claim in bankruptcy which, because of its fraudulent nature, should not in good conscience have

been paid on a parity with other claims. But this Court was there considering not the order in which claims should be paid, but simply whether a claim should be allowed. It clearly did not indicate that a bankruptcy court has the power to fix priorities for debts within the same class. And since *Warren* v. *Palmer,* 310 U. S. 132, involved a reorganization, which was being successfully carried out, the section establishing priorities in a bankruptcy proceeding was not applicable. Consequently, without regard to that section, this Court properly applied the rule that expenses which have contributed to the creation or preservation of a fund in the court's custody shall be paid before general disposition.

But section 64a does not permit the court to grant priority to one debt in that class over another, and this would be true even if the priority claimed by the petitioner would be recognized in equity. *Southern Bell Telephone & Telegraph Co.* v. *Caldwell,* 67 F. (2d) 802 (C. C. A. 8th). In circumstances similar to those here, proration among all claimants in a class has been approved. *In re Ehrlich,* 3 F. (2d) 62 (E. D. Pa.); *In re Englander,* 39 F. (2d) 931 (W. D. Pa.). In the few cases where courts have held that under their equity powers they can set up an order of payment not designated in the statute, they have confined the exercise of such powers to very narrow limits and such deviations would not support the peti-

tioner's claim here. See *In re Automotives Co.*, 7 F. Supp. 614 (N. D. Ohio).

Finally, the decision of the court below will not, as a practical matter, hinder effective administration of the estates of bankrupts. Expenses of the kind given priority by the referee here will share equally with all other expenses covered by class one in section 64, and in many instances the fund will be more than sufficient to pay all of these expenses.

Moreover, the persons charged with the administration of the estate and with conducting the bankruptcy proceeding are not always required to assume financial responsibility for the expenses incurred. General Order 10, issued by this Court, provides that before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Also in General Order 35 (4) it is provided in any case in which the fees of the clerk, referee, and trustee are not required by the Act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can ob-

tain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. The judge may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees, receivers, and trustees to be paid immediately after such commissions accrue and are earned. Consequently, these orders afford considerable protection to persons who assume duties under the Bankruptcy Act, and such protection makes for the expeditious and effective handling of bankruptcy matters. However, even if this were not so, the courts would still be without authority to allow the priority claimed here. Congress has covered the matter of priorities fully in a statute which is unambiguous, and any relief or changes desired must be granted by Congress.

CONCLUSION

The decision of the lower court is correct and not in conflict with any other decisions. Accordingly, the petition should be denied.

Respectfully submitted.

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JULY 1941.